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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 527

Case No. 582: HAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 13 February 1991, Xiaoxin Han, a former staff member of the United Nations, filed an application, containing the following pleas:

"PLEAS OF THE APPLICANT

MAY IT PLEASE the presiding member to agree to the holding of oral proceedings in this case.

AND MAY IT PLEASE the Tribunal:

1. To declare itself competent in this case;

2. To declare and judge the present application receivable;

3. To order the rescission of the individual decision of the Secretary-General of the United Nations - as communicated in a letter dated 29 November 1990 from the Assistant Secretary-General for Human Resources Management - to refuse to consider, on grounds of non-receivability, the Applicant's request in his letter dated 10 July 1990 that Judgement No. 482, rendered on 25 May 1990 by the Administrative Tribunal in the Qui, Zhou and Yao cases, should be applied to him; and to follow up all the legal aspects of such rescission;

3.1. Accordingly, to order the Respondent to reinstate the Applicant, enabling him to resume his career with effect from 1 February 1990, and offering him a career appointment with effect from that date;

4. To fix the amount of compensation provided for in article 7, paragraph 3 (d), of the Rules of the Tribunal at a sum equal to three years' salary - calculated on the basis of the most recent payment - supplemented by lawful interest as computed from a date to be left to the discretion of the Tribunal;

5. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of the filing of this application at forty thousand (40,000) French francs, subject to adjustment upon completion of the proceedings."

Whereas the Respondent filed his answer on 27 March 1991;

Whereas the Applicant filed written observations on 22 April 1991;

Whereas, on 30 April 1991, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the parties, to which the Respondent replied on 7 May 1991 and the Applicant on 8 May 1991;

Whereas, on 1 May 1991, the President of the Tribunal decided that there would be no oral proceedings in the case;

Whereas, on 3 May 1991, the Applicant submitted another letter referring to his written observations;

Whereas, on 14 May 1991, the Applicant submitted a further letter to the Tribunal concerning his request for reimbursement of costs;

Whereas the facts in the case are as follows:

The Applicant, Xiaoxin Han, at the time a national of the People's Republic of China (China) and a former student at the Foreign Language Institute of Beijing, passed the 1984 competitive examination for Chinese verbatim reporters held by the United Nations. He was recruited on 16 November 1984 and was given a five-year fixed-term contract at the P-2, step IV level, as an associate translator in the Chinese Unit, Translation Section, United Nations Industrial Development Organization (UNIDO) in Vienna (at the time still a United Nations organ). His letter of appointment stated that he was "on secondment from [the] Chinese Government". After UNIDO became a specialized agency, the Applicant continued working there as a United Nations staff member assigned to the new organization.

During the course of his employment with the United Nations, the Applicant's overall performance was rated as "excellent". He was promoted to the P-3 level, effective 1 November 1986.

In a memorandum dated 11 March 1988, the Officer-in-Charge, Languages and Documentation Division, UNIDO, recommended to the Deputy Director-General, Department of External Relations, Public Information, Languages and Documentation Services, that the Applicant's appointment be extended for two years.

On 28 April 1989, the Chief of the Personnel Administration Section informed the Applicant that the Director-General of UNIDO, in consultation with the Deputy Director-General of the Applicant's department, the Deputy Director-General of Administration and the Director of Personnel, had decided to recommend a two-year extension of his appointment. Since he was serving in UNIDO on assignment from the United Nations, UNIDO's recommendation would be forwarded to the United Nations Secretariat for a decision.

By a telegram dated 3 May 1989, UNIDO sought United Nations Headquarters' approval of the decision. In a reply received on 31 May 1989, a personnel officer asked UNIDO to send an updated performance evaluation report as soon as possible and noted that the Department of Conference Services (DCS) would not agree to an extension of the Applicant's assignment or appointment without the prior consent of the Chinese Government. The Applicant's performance evaluation report was forwarded to United Nations Headquarters on 2 June 1989.

On 2 June 1989, a UNIDO recruitment officer recorded in a Note for the File the tenor of a conversation held with the First Secretary of the Permanent Mission of China to UNIDO, who had informed her that "according to the communications received from Beijing, his Government ... decided not to extend the services with UNIDO of ... and Han whose present contract will expire in September [sic] 1989."

In a note verbale dated 2 June 1989, the Permanent Mission of China to the United Nations informed the Secretariat that the Chinese Government would "soon recommend candidates to replace Mr. HAN Xiaoxin and ... , both serving as translators in the Conference Services of the United Nations Industrial Development Organization. Mr. Han['s] and ... secondment will, therefore, not be extended when they expire in November 1989."

On 16 June 1989, a personnel officer at Headquarters informed the Chief of the Personnel Administration Section of the Chinese Mission's position concerning the Applicant and indicated that, accordingly, the Administration could not approve an extension of his appointment.

On 16 July 1989, the Applicant wrote to the Secretary-General requesting him to conduct "an urgent investigation" into the Organization's secondment practices with respect to Chinese nationals. He indicated that the practice of consulting the Chinese Government before appointing a staff member constituted "unequal treatment among nationals from different countries in violation of the spirit and letter of the UN Charter". He also referred to his Government's practice of obliging Chinese nationals working in the Secretariat to hand over their entire salaries to the Government "in return for a shamefully small percentage therefrom". He indicated that in view of the manner in which the Chinese Government had dealt with the student demonstrations in Beijing, he had decided not to hand any further amounts of his salary to his Government.

On 15 November 1989, the Director, Staff Administration and Training Division, Office of Human Resources Management (OHRM), informed the Applicant that his request for an extension of his appointment was being "carefully considered by the Office of Human Resources Management in consultation with the Department of Conference Services and the United Nations Industrial Development Organization."

In a further letter, dated 12 December 1989, the Director, Staff Administration and Training Division, OHRM, informed the Applicant that his request for a further appointment with the United Nations had "been carefully considered" by the Department of Conference Services and the Office of Human Resources Management in consultation with UNIDO. He noted in this regard:

> "I appreciate your interest in remaining in the service of the United Nations, but I regret to inform you that the Organization is not in a position to offer you a new appointment at this time.
>
> However, in consideration of the closeness of the date of the current extension of your fixed-term appointment, and in order to afford you more time to make new plans, your present appointment will be further extended to 31 January 1990."

The Applicant's appointment was finally extended for three consecutive fixed-term periods of respectively 15 days, to 30 November 1989, 22 days, to 22 December 1989, and one month and nine days, to 31 January 1990, the date on which the Applicant separated from service with the United Nations.

The Tribunal rendered its Judgement No. 482 on 25 May 1990, in the Qiu, Zhou and Yao cases, which caused the Secretary-General to review the Organization's secondment practices and which the Applicant invokes as a precedent constituting an authority.

On 10 July 1990, and again on 12 August 1990, the Applicant requested review of the decision not to extend his contract beyond 31 January 1990. On 20 August 1990, the Chief of the Administrative Review Unit informed the Applicant that, although the Secretary-General reserved the right to raise at a later stage the issue of receivability, the review requested by the Applicant would be conducted.

On 18 October 1990, the Secretary-General submitted a report to the General Assembly, on secondment from government service (A/C.5/45/12), which interpreted Tribunal Judgement No. 482 to mean "that many staff members on fixed-term contracts, formerly thought to be on secondment, would in fact not be in that status, ... Such persons would instead be ... subject to the standard principles of renewal or non-renewal as set out in the Staff Regulations and Rules". By a memorandum of 15 November 1990, the Assistant Secretary-General for Human Resources Management authorized the establishment of a Joint DCS/OHRM Working Group for the Review of the Contractual Status of Staff Members "On Secondment" (Working Group).

Having received no further reply from the Administration, the Applicant, on 1 November 1990, sought the Secretary-General's agreement for submission of his appeal directly to the Tribunal. On 29 November 1990, the Assistant Secretary-General for Human Resources Management informed the Applicant that:

> "Having noted that your service with the Organization ceased on 31 January 1990, I wish to bring to your attention that staff members alleging, as you do, the violation of their rights, may avail themselves within specified time-limits, of the procedures set out in the Staff Regulations and Rules for that purpose. As you did not so avail yourself of the appropriate recourse procedures, I regret to inform you that your belated allegations and complaints are not receivable because they are time-barred.

> With respect to your letter of 1 November 1990 requesting the Secretary-General's agreement to the direct submission of your case to the Administrative Tribunal, the Legal Counsel has informed me that he has no objection to your request. The Secretary-General, therefore, agreed to the direct submission you request, in accordance with the provisions of article 7.1 of the Statute of the Administrative Tribunal."

In January 1991, the Applicant acquired Austrian nationality.

On 20 January 1991, the Applicant wrote to the Assistant Secretary-General for Human Resources Management acknowledging receipt of his letter of 29 November 1990, and requesting that the Applicant's case be urgently considered by the Working Group. The Assistant Secretary-General gave a negative reply on 28 January 1991.

On 13 February 1991, the Applicant filed with the Tribunal the application referred to earlier.

On 27 February 1991, the Working Group issued a report setting out its terms of reference, as well as "Recommendations for Measures Pending Adoption of Definitive Policies on Secondment" (dated 29 November 1990), and its recommendations regarding Chinese and Russian staff.

On 10 April 1991, the Applicant requested the Secretary-General to review the decision of 28 January 1991 rejecting his request that his case should be submitted to the Working Group. On 29 April 1991, a principal officer, General Legal Division, Office of Legal Affairs, responded on behalf of the Secretary-General, to the effect that the decision of 28 January 1991 was already before the Tribunal and that the Applicant's request of 10 April 1991 was moot.

On 3 May 1991, the Applicant sent to the Tribunal the letter referred to earlier, arguing that the principal officer's letter of 29 April 1991, gave implicit consent to direct review of the Secretary-General's decision of 28 January 1991. If that was not so, he requested the Tribunal to confirm the Respondent's agreement to direct submision of the new request.

Whereas the Applicant's principal contentions are:

1. The time-limits for lodging the Applicant's appeal should be waived in view of the serious reasons which prevented his compliance therewith.

2. Article 7, paragraph 5, of the Tribunal's Statute enables it to waive time-limits.

3. The Applicant's situation is virtually identical to that of the three United Nations staff members whose applications are the subject of Tribunal Judgement No. 482. Thus his case should be similarly decided.

Whereas the Respondent's principal contentions are:

1. Staff rule 111.2(a) specifies time-limits for lodging appeals against administrative decisions. The Applicant's request for a review of the contested decision was out of time.

2. The "Scope and purpose" provision of the Staff Regulations vests in the Secretary-General the authority and discretion to enforce Staff Rules as he considers necessary. The Secretary-General's decision to apply staff rule 111.2(a) was a proper exercise of this authority.

3. The Secretary-General's decision to apply staff rule 111.2(a) is only reviewable if an Applicant can establish prejudice or improper motive.

4. Article 7, paragraph 5, of the Tribunal's Statute enables the Tribunal to waive time-limits imposed by the Statute on receivability of applications to the Tribunal. It is not intended to apply to time-limits prescribed by the Staff Rules for receivability of requests to the Secretary-General for review of contested decisions.

The Tribunal, having deliberated from 10 to 31 May 1991, now pronounces the following judgement:

I. Having considered the Applicant's request for an oral proceeding, the Tribunal does not believe it is necessary to accede to it.

II. In 1984, the Applicant passed the United Nations competitive examination for Chinese verbatim reporters. He was recruited in 1984 for a period of five years (P-2, step IV), as an associate translator in the Chinese Unit of the UNIDO Translation Section in Vienna. His letter of appointment stated that he was "on secondment from [the] Chinese Government".

Following upon the refusal by the Permanent Mission of China to UNIDO, the Respondent approved the extension of the Applicant's contract until 31 January 1990 only.

III. Although the Applicant protested in writing to the Secretary-General on 16 July 1989, against the Respondent's practice of consulting the Chinese Government before making an appointment, he failed to lodge within the stipulated time-limits an internal appeal against the Administration's decision of 12 December 1989, refusing to extend his contract.

IV. However, seven months later, on 10 July 1990, the Applicant addressed to the Secretary-General, from Vienna, a request for a review of the decision of 12 December 1989. In support of his request, he cited the application of Judgement No. 482, rendered on 25 May 1990, in the cases of his three compatriots Qiu, Zhou and Yao.

V. On 20 August 1990, the Administration informed him that:

> "Although the Secretary-General reserves the right to raise at a later stage the issue of receivability, the review you request will be conducted."

VI. On 15 November 1990, the Administration (Office of the Assistant Secretary-General for Human Resources Management) set up a "Working Group for the Review of the Contractual Status of Staff Members 'On secondment'". On 29 November 1990, it submitted to the Working Group recommendations on the measures to be taken. Paragraph 5(b) (ii) of the recommendations states:

> "Any request for reinstatement, administrative review or appeal submitted after the normal time-limits would be treated as time-barred".

VII. Also on 29 November 1990, the Assistant-Secretary-General for Human Resources Management informed the Applicant that his belated allegations and complaints were not receivable "because they are time-barred".

VIII. The Tribunal notes that, contrary to the undertaking made by the Administration on 20 August 1990, the review requested by the Applicant of his situation, received no substantive consideration. The Administration reserved the right to raise the issue of the receivability of the Applicant's request, but after conducting a substantive review. The Tribunal must therefore consider whether such omission was detrimental to the Applicant's interests or rights.

IX. The Tribunal is of the view that the Respondent was obliged to conduct the substantive review to which it had spontaneously agreed. At the same time, upon completion of such a review and regardless of the findings resulting therefrom, the Respondent retained the right to invoke the non-receivbility of the Applicant's request.

X. The Tribunal considers it regrettable that the Respondent did not conduct a substantive review of the Applicant's case. However, in the light of the general policy in respect of such cases, as reflected in the report of 27 February 1991 (Report of the Joint DCS/OHRM Working Group (Working Group)) and its annex II, paragraph 5 (b) (ii), it is apparent that, in any event, the Respondent would ultimately have claimed that the request was not receivable on the ground that it was time-barred.

The Tribunal must therefore determine whether such ground for non-receivability actually exists.

XI. The Applicant acknowledges that he was notified at the end of December of the decision of 12 December 1989, not to renew his contract. He did not contest this decision until 10 July 1990, seven months after the date of notification and thus after the time-limit stipulated in staff rule 111.2 (a). The Applicant acknowledges that "Applicants must respect the deadline rule, under pain of having their applications delcared time-barred". He does, however, cite exceptions to such principle either in texts or in decisions of the Tribunal.

XII. The Tribunal is of the view that article 7, paragraph 5, of its Statute is not applicable in this instance. The text of that article and the relevant decisions of the Tribunal demonstrate clearly that suspension of the provisions regarding time-limits relates exclusively to time-limits for appeals lodged with the Tribunal. It does not relate to the time-limits for internal appeals provided for in the Staff Rules.

XIII. The Tribunal also notes that the Joint Appeals Board may also waive the specific time-limit in exceptional cases (staff rule 111.2 (e)).

XIV. Under rule 111.2 (a), the staff member must, within a mandatory time-limit, file an internal appeal against an administrative decision that he contests. The Staff Rules make no express provision for any suspension of such time-limit. The Respondent may, however, waive the time-bar. He can extend the time-limit expressly or implicitly (Judgements No. 398, Millburn (1987), para. I, and No. 180, Osman (1973), paras. II and III). In so doing, he exercises discretionary power within the limits set by the case law of the Tribunal - errors of fact or law, partiality, arbitrariness and discrimination. It is for the Applicant to show that the Administration's refusal to waive the time-bar is tainted by one of these defects.

XV. In this instance, the Tribunal considers that none of the de facto or de jure grounds invoked by the Applicant is sufficient to invalidate the Respondent's decision to declare the Applicant's belated internal appeal not receivable. The Tribunal is of the view that the Respondent's decision not to renew the Applicant's contract was final and unambiguous.

XVI. The Tribunal notes that the Applicant's situation "was not different from that of Chinese staff members at the time". The internal appeal filed within the time-limit, even if it had been divulged outside the Organization, consisted simply of a letter "requesting that [the] decision should be reviewed". The Tribunal considers that this appeal would not have altered the unquestionably distressing situation in which the Applicant found himself.

XVII. If the unsupported statement that the Applicant's supervisor in Vienna "had strongly advised him against appealing" is correct, the Tribunal can only hope that the supervisor in question will make every effort to facilitate the Applicant's reinstatement in the international civil service. The Tribunal notes that UNIDO awarded the Applicant an initial short-term contract from February to July 1991, in the light of his newly-acquired Austrian nationality.

XVIII. The Tribunal in fact considers that the Respondent did not exceed his competence in exercising his discretionary power not to waive the time-limit barring the Applicant's appeal. The Respondent's contention that, on that ground, the appeal is not receivable is therefore justified. In the circumstances, the fact that the Respondent did not conduct a substantive review is immaterial. The Tribunal had before it all the necessary information.

XIX. The Tribunal notes that, apart from the question of receivability, the Applicant's situation appears to be the same as that of Applicants Qiu, Zhou and Yao (Judgement No. 482 (1990)). That is in fact the position taken by the Chief of the UNIDO Personnel Administration Section in an interoffice memorandum to Ms. Diana Boernstein, Chief, United Nations Administrative Review Unit, dated 25 September 1990:

> "From the records kept in Vienna, it is obvious that Mr. Han joined and served the United Nations under conditions not only similar but almost identical to those of the three Chinese who applied to the United Nations Administrative Tribunal (UNAT)." (Emphasis added by the Tribunal).

In view of the exceptional circumstances of the case, the Tribunal considers that it would be altogether fair to facilitate the Applicant's reinstatement in the United Nations or a specialized agency.

XX. The Applicant requests the Tribunal to regard the pleas set out in his application as including the rescission of the Respondent's decision of 28 January 1991, refusing to submit his case to the Working Group. Ruling

on that request, the Tribunal finds that the decision was no more than a consequence of the decision of 29 November 1990, and was valid for the same reasons.

XXI. The application having been rejected, the Tribunal finds that there are no grounds for allowing the Applicant's request that he should be awarded a sum to cover costs.

XXII. For the foregoing reasons, the Tribunal decides:

1. That it is competent and the application is receivable;

2. That the decision of 29 November 1990, declaring the Applicant's internal appeal not receivable is valid;

3. That the decision of 28 January 1991 is valid;

The Tribunal rejects all the Applicant's other pleas.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

Geneva, 31 May 1991

Paul C. SZASZ
Acting Executive Secretary